

Horticulture—Rules and Regulations of the Department of Agriculture.

A regulation requiring all orchards infested with codling moth situated in a described locality to be sprayed twice with arsenate of lead, 3 pounds to 100 gallons of water, with a pump capable of developing 200 pounds pressure, and under the direction of an authorized inspector of the Department of Agriculture, held to be enforceable on condition that 3 pounds of arsenate of lead to 100 gallons of water is a reasonably necessary spray and subject to the condition that application by a pump, capable of developing 200 pounds pressure, and under the direction of an authorized inspector of the Department of Agriculture, is likewise reasonable.

J. C. Wood, Esq.,
State Horticulturist,
Missoula, Montana.

My dear Mr. Wood:

You have submitted the question as to whether the following regulations can be enforced under the Montana Horticultural Law:

"All orchards infested with codling moth in Ravalli County and that part of Missoula County south of the Lolo grade (in which your orchard is included) will have to be sprayed twice with arsenate of lead, 3 pounds to 100 gallons of water, with a pump capable of developing 200 pounds pressure and under the direction of an authorized inspector of the Department of Agriculture.

"Failing in this all fruit must be removed from trees and destroyed while the worms are yet in the apples or the orchard will be condemned and destroyed.

"This procedure is made necessary to prevent the further spread of the codling moth.

"This notice is sent you at this early date in order to give you ample time to secure machinery and material and to be prepared to do the work."

The provisions of the Horticultural Law relating to the control and eradication of insect pests are, in part, as follows:

Chapter 121, Sec. 1923 A, Laws of 1911:

"It shall be the duty of the State Horticulturist to enforce the laws of the state relative to the growing and marketing of fruits, and traffic in nursery stock, the control and destruction of insect pests, fungus and bacterial diseases, the enforcement of the provisions relating to the licensing of firms, persons or corporations engaging in the business of selling or importing fruits, trees, plants, or nursery stock in this state.
* * *

Chapter 121, Sec. 1927, Laws of 1911:

"If any person or persons, corporation or corporations, shall fail or refuse to forthwith comply with the instructions of said inspector, for the eradication of any disease or pest, said inspector shall proceed forthwith to eradicate such disease or pest and the expense of the same shall become a charge and lien upon the property of such owner."

It will be noted that the only provision made or penalty fixed by this section is that "said inspector shall proceed forthwith to eradicate such disease or pest and the expense of the same shall become a charge and lien upon the property of such owner."

Under this provision, the Department would not be authorized to add the penalties of removal of fruit and destruction of orchards,

unless the inspector had previously followed out this provision, and the removal or destruction *thereafter* became necessary to protect the industry.

If regulations made by a board or department, such as the State Board of Horticulture of Montana, are reasonable and necessary for the protection of the fruit-growing industry, they are enforceable. This rule is supported generally by the decisions, and has been sustained in Montana.

Colvill v. Fox, 51 Mont. 72.

In this case the Supreme Court of Montana used the following language:

"It cannot be contended successfully that the protection of the horticultural industry from the ravages of insect pests or dangerous, contagious fruit diseases is not well within the limits of the police power of the state. In *Noble State Bank v. Haskell*, 219 U. S. 104, Ann. Cas. 1912A, 487, 32 L. R. A. (n. s.) 1062, 55 L. Ed. 112, 31 Sup. Ct. Rep. 186, the court said: 'In a general way * * * the police power extends to all the great public needs. * * * It may be put forth in aid of what is sanctioned by usage, or held by the prevailing morality or strong and preponderant opinion to be greatly and immediately necessary to the public welfare.' This language was quoted with approval in *Cunningham v. Northwestern Improvement Co.*, 44 Mont. 180, 119 Pac. 554."

State v. Main, 36 L. R. A. 623;
Riverside County v. Butcher, 65 Pac. 745;
Los Angeles County v. Spencer, 59 Pac. 202;
Carstens v. DeSollem, 144 Pac. 934;
12 Corpus Juris, 1216, note 14;
Walsh v. Glenn, 43 L. R. A. (N. S.) 1068.

See, also:

Cunningham v. Northwestern Improvement Co., 44 Mont., 180;
Note in 43 L. R. A. (N. S.) 1068-1081;
15 L. R. A. (N. S.) 61;
32 L. R. A. (N. S.) 1078.

A State board must, however, conform strictly to the power granted by the statute, and any proceeding or requirement beyond the authorization of the statute, and any regulation that is not reasonable and necessary to accomplish the protection of the fruitgrowing industry, would not be sustained or be enforceable. See above cases and also:

Fort Worth v. Masterson, 66 S. W. 833;
Trent v. State, 75 S. W. 857;
U. S. v. L. & N. Ry., 176 Fed. 942;
State v. Southern Ry., 54 S. E. 294.

It is, therefore, my opinion that provision No. 1 of your regulations may be required of orchard owners, and upon failure the inspector may carry out the provision and charge the cost of same to the orchard owner, subject to the condition that 3 pounds of arsenate of lead to 100 gallons of water is a reasonably necessary spray as compared with other solutions or applications, and subject to the further condition that application by a pump, capable of developing 200 pounds pressure, and under the direction of an authorized inspector of the Department of Agriculture, is likewise reasonable. As to the reasonableness of these two requirements this office passes no opinion, as those are matters that come within the expert knowledge of specialists in the horticulture field, and if they are, in fact, unreasonable and unnecessary, the Department would enforce them at its own risk.

Should the moth not be controlled by the regulations carried out as just stated, then the second provision or regulation of removal of fruit from the trees may be carried out by the inspector and the cost charged as above stated, provided that same is a necessary and reasonable regulation for the protection of the industry.

Should the removal of the fruit still prove ineffective, and should the destruction of the orchard then become reasonably necessary for the eradication of the pest in the particular orchard destroyed and for the prevention of the spread of the pest, and thus a necessary and reasonable regulation for the protection of the industry, this may then be done by the inspector and the cost charged as above stated.

Very truly yours,

WELLINGTON D. RANKIN,
Attorney General.